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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF [REDACTED]

DATE: OCT. 19, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a public school system, seeks to employ the Beneficiary as a secondary school teacher under the second preference “alien of exceptional ability” immigrant classification. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national with exceptional ability in the sciences, arts, or business whose employment would substantially benefit the United States.

The Director, Nebraska Service Center, denied the petition. The Director found that “no representations have been made that the [B]eneficiary has exceptional ability” and adjudicated the petition as if the Petitioner sought to classify the Beneficiary as a member of the professions holding an advanced degree – the other classification provided under section 203(b)(2) of the Act. The Director denied the petition on the ground that the job offered by the Petitioner does not require a professional holding an advanced degree or the equivalent.

The matter is now before us on appeal. Upon *de novo* review, we will withdraw the Director’s decision. The case will be remanded to the Director for further consideration and the issuance of a new decision.

I. LAW

Second preference immigrant visas are available for qualified individuals who are advanced-degree professionals or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2) of the Act. Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).

Every petition under this classification must include one of the following three documents: (1) an individual labor certification from the Department of Labor, (2) an application for Schedule A designation, or (3) documentation to establish that the beneficiary qualifies for one of the shortage occupations in the Department of Labor’s Labor Market Information Pilot Program. 8 C.F.R. § 204.5(k)(4)(i).

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Schedule A Group II designation requires that a petitioner submit evidence of the beneficiary's exceptional ability in the sciences or arts as demonstrated by widespread acclaim and international recognition from recognized experts in the field. 20 C.F.R. § 656.15(d)(1). In addition, the petitioner must provide evidence meeting at least two of the following seven criteria:

- (i) Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought;
- (ii) Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields;
- (iii) Published material in professional publications about the alien, about the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material;
- (iv) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought;
- (v) Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought;
- (vi) Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation; [and]
- (vii) Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

Id. If a petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the antecedent regulatory requirement of three types of evidence. See *Kazarian v. USCIS*, 596 F.3d 1115, 1122 (9th Cir. March 4, 2010). If the petitioner has submitted the requisite evidence, USCIS (U.S. Citizenship and Immigration Services) makes a final merits determination as to whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2); see also *Kazarian*, 596 F.3d at 1119-20. Only individuals whose achievements demonstrate "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business" are eligible for classification as aliens of exceptional ability. 8 C.F.R. § 204.5(k)(2); see also *Kazarian*, 596 F.3d at 1119-22.

While *Kazarian* involved a different classification than the one at issue in this proceeding, the similarity of the two classifications makes the court's reasoning in *Kazarian* persuasive to the classification sought in this matter. Specifically, the regulations state a regulatory standard and

provide a list of suggested types of evidence, of which the petitioner must submit a certain number. Significantly, USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *See Kazarian*, 596 F.3d at 1221, citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008). Thus, if the regulatory standard is to have any meaning, USCIS must be able to evaluate the quality of the evidence in a final merits determination.

In addition to meeting two of these criteria, the documentation presented must show that the beneficiary worked for the past year in a position that requires an individual of exceptional ability and that the beneficiary's services are sought for a position that requires an individual of exceptional ability. *Id.* As with any filing for an employment-based immigrant that requires an offer of employment, this petition must be accompanied by evidence that the prospective U. S. employer has the ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2).

II. ANALYSIS

On the instant Form I-140, Immigrant Petition for Alien Worker, the Petitioner checked the box 1.d in Part 2, indicating it was applying for “[a] member of the professions holding an advanced degree or an alien of exceptional ability.” An accompanying letter specified that the Petitioner was seeking to classify the Beneficiary as an “alien of exceptional ability.” It did not mention the alternative classification of advanced degree professional. The supporting letter claimed that documentation submitted with the petition showed that the Beneficiary satisfied four of the six criteria listed at 8 C.F.R. § 204.5(k)(3)(ii) to qualify as an alien of exceptional ability. The Petitioner restated its intention regarding the classification sought in its response to the Director’s notice of intent to deny the petition.

In view of the Petitioner’s clearly stated intent and the evidence submitted in support of the requested classification, the Director’s statement in his denial decision that “no representations have been made that the beneficiary has exceptional ability” is factually incorrect. Moreover, the Director’s denial of the petition on the ground that the job offered does not require a professional holding an advanced degree, a classification not sought in this petition, was legally incorrect.

III. CONCLUSION

As the Director has not determined whether the Beneficiary qualifies for the classification requested in this petition – “alien of exceptional ability” – the matter will be remanded to the Director for further consideration of whether the requisite evidence has been submitted that the Beneficiary satisfies at least three of the criteria listed at 8 C.F.R. § 204.5(k)(3)(ii) and, if so, whether the evidence demonstrates “a degree of expertise significantly above that ordinarily encountered,” in consistent with 8 C.F.R. § 204.5(k)(2) and *Kazarian*, 596 F.3d at 1119-20. The Director may request further evidence from the Petitioner, if necessary, to address other relevant issues, and shall accord the Petitioner an appropriate time period to respond.

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Matter of [REDACTED]

ORDER: The decision of the Director, Nebraska Service Center, is withdrawn. The matter is remanded to the Director, Nebraska Service Center, for further proceedings consistent with the foregoing decision and for the entry of a new decision, which, if adverse, shall be certified to us for review.

Cite as *Matter of* [REDACTED] ID# 123528 (AAO Oct. 19, 2016)